Planned Building Services, Inc. *and* Local 32B-32J, Service Employees International Union, AFL–CIO

United Workers of America *and* Local 32B-32J, Service Employees International Union, AFL–CIO.
Cases 29–CA–19758–2 and 29–CB–9911

March 7, 2000

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 22, 1996, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party Union filed exceptions and supporting briefs, and Respondent Planned Building Services, Inc. (PBS) filed an answering brief.

On May 6, 1997, the National Labor Relations Board remanded these proceedings to the judge for additional credibility determinations and factual findings. On June 3, 1997, the judge issued the attached supplemental decision, containing his additional credibility determinations, factual findings, and conclusions of law. The General Counsel, the Union, and PBS filed exceptions and supporting briefs, and PBS filed an answering brief.[1]

On August 11, 1999, the Union filed a motion requesting that the Board hold a hearing to ascertain if a witness committed perjury in a different and more recent Board proceeding. The Union further moved that the Board reopen the record in this proceeding in order to receive its proffered evidence of perjury or, in the alternative, remand the proceeding to the judge for new credibility resolutions based on the assertedly fabricated testimony. The Union also moved that the Board refer to the Department of Justice the issue of whether the witness' testimony violated 18 U.S.C. § 1001. The Respondent filed an opposition to the motion and a cross-motion for sanctions against the Union.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, supplemental decision, and the record in light of the exceptions, briefs, motion, and opposition, and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

On December 28, 1995, the Smith Haven Mall on Long Island, New York, was sold by Prudential, Inc. to Simon Property Group a/w M.S. Management Associates. Under Prudential's ownership, building maintenance and landscaping services had been provided by General Growth Management Company, Inc., whose employees were represented by the Union. Before Simon bought the mall, it arranged with PBS to provide building maintenance services inside the mall. When PBS took over, it announced in advance that the terms and conditions of employment would not be as favorable as those extended under the collective-bargaining agreement between General Growth and the Union. PBS hired a number of former General Growth employees, but not enough to constitute a majority of PBS' employee complement.

The complaint alleges that PBS violated Section 8(a)(1) of the Act by informing candidates for employment that it would not hire, as a majority of its workforce, former employees of General Growth. It also alleges that PBS violated Section 8(a)(3) by refusing to hire several named individuals in order to avoid hiring, as a majority of its work force, former employees of General Growth and thus to avoid becoming a successor to General Growth with an obligation to recognize and bargain with the Union.[4] The complaint also alleges that, because of its unlawful refusal to hire those individuals, PBS must be deemed the successor to General Growth and that it not only has an obligation to recognize and

[1] PBS contends that the Union's exceptions should be denied because they fail to comply with the requirements of Sec. 102.46(b) of the Board's Rules and Regulations. We find no merit in that contention. Although the Union's exceptions do not comply in all respects with the provisions of Sec. 102.46(b), they are not so deficient as to warrant striking. In any event, PBS has not shown prejudice resulting from any deficiency. See, e.g., *Teamsters Local 851 (Purolator Courier)*, 268 NLRB 452 fn. 1 (1983). In particular, we note that, except for one remedial issue discussed below, we have not found merit to any of the Union's exceptions. And with regard to that issue, it is settled that where remedial matters are concerned, the Board may impose a remedy not recommended by the judge, even in the absence of exceptions. *Monfort, Inc. v. NLRB*, 965 F.2d 1538, 1548 fn. 15 (10th Cir. 1992).

[2] The General Counsel and the Union have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The judge stated that, in his view, the General Counsel has the burden of persuasion with respect to credibility issues. It is well established that the General Counsel has the burden of proving violations of the Act, and of course he can do so only by producing credible evidence. To the extent that the judge's statement might be read to suggest that the General Counsel bears some other, special burden when credibility is at issue, we do not rely on it. In any event, the judge properly based his credibility assessments on the demeanor of witness Joanne Stratakos and on the probabilities of the differing versions of the testimony.

Member Fox joins her colleagues in affirming the judge's credibility determinations, but solely because they were based largely on his favorable assessment of Stratakos' demeanor.

The judge gave an incorrect citation to *Advanced Stretchforming International, Inc.* The correct citation is 323 NLRB 529 (1997).

[3] For the reasons discussed below, we shall amend the judge's Order to require PBS to post notices at all its facilities.

The judge inadvertently ordered make-whole relief with interest under *Florida Steel Corp.*, 231 NLRB 651 (1977), rather than *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall amend his recommended Order to correct the error. We shall also modify the Order to be consistent with *Excel Container, Inc.*, 325 NLRB 17 (1997).

[4] See *NLRB v. Burns Security Services,* 406 U.S. 272 (1972).

bargain with the Union, but also lost its freedom to set the unit employees' initial terms and conditions of employment.[5] The complaint alleges that PBS therefore violated Section 8(a)(5) by unilaterally changing the unit employees' terms and conditions of employment. Finally, the complaint alleges that the former employees of General Growth who did not accept employment with PBS because PBS was offering terms and conditions that were inferior to those the employees had enjoyed under the collective-bargaining agreement between General Growth and the Union were, in effect, constructively refused employment in violation of Section 8(a)(5).

1. The judge found that PBS did not make the alleged unlawful statement and that the evidence was insufficient to establish that PBS unlawfully refused to hire any former employees of General Growth in order to avoid incurring an obligation to bargain with the Union. In so finding, he credited the testimony of PBS Vice President Joanne Stratakos over that of the General Counsel's witnesses. Clearly, then, Stratakos' credibility is a key issue in this case.

In its motion for a hearing and to reopen the record or to remand to the judge for further credibility findings, the Union claims that Stratakos gave false testimony in a more recent case involving the Respondent.[6] The Union argues that the Board should either discredit her in this proceeding or remand the proceeding to the judge for new credibility determinations. We deny the Union's motion for the following reasons.

To begin with, there has been no showing that Stratakos did, in fact, give false testimony in the more recent hearing. No decision in that case has issued; thus, there is no basis on which we might conclude that Stratakos was untruthful in that proceeding.

But even if the administrative law judge in that case discredits Stratakos' testimony, that finding would not warrant granting the Union's motion. Stratakos' testimony in Case 2–CA–31245 has nothing to do with the events in this case. Rather, the Union seeks to introduce this testimony as evidence of her alleged propensity to give false testimony and thus to serve as a basis for discrediting her testimony in this case. It is well settled, however, that the Board will not reopen the record to receive evidence that would merely discredit, contradict, or impeach a witness.[7]

Moreover, Section 102.48(d)(1) of the Board's Rules and Regulations provides that the record will be reopened only if the new evidence would require a different result if adduced and credited.[8] The Union's evidence, even if credited, would not require the judge to revise his assessment of Stratakos' credibility. As Judge Learned Hand famously remarked long ago, "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."[9] For the foregoing reasons, then, we deny the Union's motion.[10]

We find no merit, however, in PBS' request for sanctions against the Union in the form of attorneys' fees and costs. The Board awards such sanctions when a party's position in litigation has been frivolous.[11] Here, although the Union's arguments in support of its motion are unpersuasive, we do not find them to be frivolous.

2. As noted above, the judge found that PBS did not make the allegedly unlawful statement and that the General Counsel had failed to establish that PBS refused to hire former General Growth employees in order to avoid incurring a bargaining obligation. As a result, he rejected the claim that PBS acted unlawfully in announcing and implementing new terms and conditions of employment. The judge further found that PBS was not obligated to recognize and bargain with the Union because it did not hire, as a majority of its work force, former employees of General Growth.[12] Finally, he found that, because PBS' setting of new terms and conditions of employment had not been shown to be unlawful, the former General Growth employees who either turned down offers of employment, or refused to apply for positions, with PBS were not unlawfully denied employment. Accordingly, he dismissed the portions of the complaint alleging violations of Section 8(a)(3) and (5). We adopt those findings, for the reasons stated by the judge.

The Union, however, contends that the job offers extended by PBS were invalid because they were unlawfully conditioned on the employees' accepting representation by Respondent United Workers of America (UWA). We reject that contention because the case was not litigated on that basis. The complaint contains no such allegation. It does allege that PBS unlawfully

[5] See, e.g., *U.S. Marine Corp.,* 293 NLRB 669 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992); cf. *Spruce Up Corp.,* 209 NLRB 194 (1974).

[6] *Planned Bldg. Services,* Cases 2–CA–31245, et al.

[7] See, e.g., *NLRB v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 625–626 (2d Cir. 1957), cert. denied 355 U.S. 818 (1957); *Roadway Package System*, 292 NLRB 376 fn. 7 (1989), enfd. mem. 902 F.2d 34 (6th Cir. 1990). The decisions cited by the Union are inapposite to this case. The Board reopened the record in those cases because evidence had come to light specifically indicating that witnesses had, *in fact*, given false testimony in those proceedings. E.g., *Electrical Workers IUE Local 745 (McGraw-Edison)*, 268 NLRB 308 (1983) (witness recanted previous testimony and admitted that he had perjured himself in Board proceeding); *Inland Containers Corp.*, 273 NLRB 1856 (1985) (witness's answer to interrogatory in court proceeding materially inconsistent with her previous testimony in Board proceeding). No such evidence has been proffered here.

[8] *Roadway Package System*, 292 NLRB at 376.

[9] *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds 340 U.S. 474 (1951).

[10] In these circumstances, there is no merit in the Union's request that we refer this matter to the Justice Department.

[11] *Frontier Hotel & Casino*, 318 NLRB 857, 860 (1995), enf. denied in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

[12] Cf. *NLRB v. Burns Security Services,* 406 U.S. at 281.

caused numerous former General Growth employees not to accept employment under terms and conditions that had been unilaterally set by PBS. However, it alleges that this conduct was unlawful only because, in the General Counsel's view, PBS was not entitled to set new terms and conditions of employment without bargaining with the Union, not because any of the terms set by PBS were in themselves unlawful. At the hearing, in his opening statement, counsel for the General Counsel said nothing to indicate that he was proceeding under the theory advanced by the Union. Finally, the arguments made by the General Counsel in his posthearing brief to the judge and in his brief in support of exceptions are consistent with the theory of the violation set forth in the complaint, rather than with that now urged by the Union. In sum, as the General Counsel has evidently chosen not to litigate this issue, we need not and do not address it.[13]

2. No exceptions were filed to the judge's finding that PBS violated Section 8(a)(1) and (2) by having its supervisors solicit union authorization cards on behalf of UWA and by recognizing UWA when UWA did not enjoy the uncoerced support of a majority of the unit employees, and that PBS violated Section 8(a)(1), (2), and (3) by entering into a collective-bargaining agreement with UWA requiring union membership as a condition of employment. The Union, however, contends that the judge's recommended Order will not completely remedy the unfair labor practices committed, especially in light of the violations found by the Board in *Planned Bldg. Services (PBS I)*,[14] 318 NLRB 1049 (1995). It urges that the Board issue a corporatewide cease-and-desist order with a blanket prohibition against recognition of any union absent certification, require PBS to post notices at each of its locations, and further require that the notice be read either by PBS' highest officer or by a representative of the Board. The Union also contends that PBS should be required to reimburse it for the expenses it incurred in investigating and litigating the unfair labor practices found here.

We reject all but one of the Union's arguments. Thus, we find no need at this time either to issue a corporatewide order or to require a reading of the notice. Those remedies are typically reserved for much more widespread and egregious unfair labor practices than those found in this case and in *PBS I*.[15] Next, we find no basis for enjoining PBS from extending recognition without certification to any union at any of its facilities. Although the Board generally orders employers to refrain from recognizing a previously assisted union at a facility where the unlawful assistance occurred until that union has been certified, we think it would frustrate legitimate union organizing if we were to preclude PBS from voluntarily recognizing even a previously unassisted union with uncoerced support of a majority of the employees. And we find no merit in the Union's request for reimbursement of its litigation expenses, which is a remedy afforded when the losing party has raised frivolous defenses.[16] PBS did not raise frivolous defenses here; indeed, it actually prevailed on several issues.

We do find merit, however, in the Union's contention that PBS should be required to post notices at each of its facilities. In *PBS I*, a PBS supervisor solicited cards for the union that PBS later recognized, thereby tainting the cards and rendering unlawful assistance to that union.[17] Notwithstanding that the Board's order in *PBS I* issued only about 4 months before the events in this case, PBS supervisors engaged in card solicitation again at the Smith Haven Mall, thereby tainting the company's recognition of UWA, the assisted union. This repeat violation of Section 8(a)(2) does not appear to be inadvertent; on cross-examination by the judge, Stratakos admitted that such card solicitation is the way the company does business.[18] For these reasons, we find that ordering PBS to post notices only at the Smith Haven Mall will not fully remedy the 8(a)(2) violations found here, and we shall order the Company instead to post the notices at all of its facilities.[19]

ORDER

A. The National Labor Relations Board adopts the recommended Order of the administrative law judge as

[13] An attempt by the General Counsel to change his theory of the case at this late date would, in any event, be untimely. See, e.g., *Indianapolis Mack Sales & Service,* 288 NLRB 1123 fn. 5 (1988).

That the Union has attempted to raise the issue is irrelevant. A charging party may not expand the scope of the complaint without the consent of the General Counsel. See, e.g., *West Virginia Baking Co.,* 299 NLRB 306 fn. 2 (1990), enfd. mem. 946 F.2d 1563 (D.C. Cir. 1991).

[14] The judge ordered PBS not to recognize UWA at the Smith Haven Mall unless and until UWA receives Board certification; not to have its supervisors solicit union authorization cards; and not to give effect to the collective-bargaining agreement with UWA. He also ordered PBS to withhold recognition from UWA at the Smith Haven Mall absent certification, and ordered the Respondents, jointly and severally, to reimburse unit employees for initiation fees, dues, and other sums that may have been exacted from them.

[15] See, e.g., *Monfort of Colorado*, 298 NLRB 73, 86–87 (1990), enfd. in relevant part 965 F.2d 1538, 1548 (10th Cir. 1992).

[16] *Frontier Hotel & Casino,* 318 NLRB at 860.

[17] 318 NLRB at 1063.

[18] PBS had entered into a collective-bargaining agreement with UWA in May 1994, which purportedly covered all PBS employees at malls in New York, New Jersey, Connecticut, and Massachusetts. Stratakos testified that she had assumed that the Smith Haven Mall would be a UWA shop because of that contract. In this case, then, the supervisors may have thought (erroneously) that their card solicitations were proper because of the contract with UWA.

[19] See *Miller Group*, 310 NLRB 1235 fn. 4 (1993), enfd. mem. 30 F.3d 1487 (3d Cir. 1994).

Member Hurtgen would not require posting at other facilities. There is no evidence that employees at other facilities are aware of the violations herein. Concededly, the Respondent's business plan (see fn. 18, supra) is arguably broad enough to support a broad order. But, the Board eschews such an order herein and instead requires broad posting of notices. In Member Hurtgen's view, such broad posting is unwarranted in the absence of a showing that other employees are aware of the misconduct herein.

modified below and orders that the Respondent, Planned Building Services, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Jointly and severally, with the United Workers of America, reimburse all former and present employees employed at the Smith Haven Mall for all initiation fees, dues, and other moneys which may have been exacted from them pursuant to the union-security provisions of the Respondents' collective-bargaining agreement, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."[20]

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at each of its facilities copies of the attached notice marked 'Appendix A.'[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since January 15, 1996."

3. Substitute the attached notice marked Appendix A for that of the administrative law judge.

B. The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Workers of America, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Jointly and severally, with Planned Building Services, Inc., reimburse all former and present employees employed at the Smith Haven Mall for all initiation fees, dues, and other moneys which may have been exacted from them pursuant to the union-security provisions of the Respondents' collective-bargaining agreement, with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."[21]

2. Substitute the attached notice marked Appendix B for that of the administrative law judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT recognize and bargain with the United Workers of America as the representative of our employees at the Smith Haven Mall, unless and until that labor organization is certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT have our supervisors solicit union authorization cards on behalf of United Workers of America or any other labor organization.

WE WILL NOT enter into or give force and effect to any collective-bargaining agreement with United Workers of America covering our employees at the Smith Haven Mall unless and until that labor organization is certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withhold recognition from the United Workers of America as the representative of our employees at the Smith Haven Mall, unless and until that labor organization is certified by the Board as their exclusive collective-bargaining representative.

WE WILL, jointly and severally, with the United Workers of America, reimburse all former and present employees employed at the Smith Haven Mall for all initiation fees, dues, and other moneys which may have been exacted from them, with interest.

PLANNED BUILDING SERVICES, INC.

[20] The Respondents need not reimburse any employees who voluntarily joined UWA before January 15, 1996, the effective date of the collective-bargaining agreement covering employees at the Smith Haven Mall. See *Cascade General*, 303 NLRB 656, 657 fn. 14 (1991), enfd. 9 F.3d 731 (9th Cir. 1993), cert. denied 511 U.S. 1052 (1994).

[21] See fn. 20 text, supra.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT act as the collective-bargaining representative of the employees of Planned Building Services, Inc. at the Smith Haven Mall, unless and until we are certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT enter into or give force and effect to any collective-bargaining agreement with Planned Building Services, Inc. covering its employees at the Smith Haven Mall unless and until we are certified by the Board as the collective-bargaining representative of those employees.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, jointly and severally with the employer, reimburse all former and present employees employed at the Smith Haven Mall for all initiation fees, dues, and other moneys which may have been exacted from them, with interest.

UNITED WORKERS OF AMERICA

James P. Kearns, Esq., for the General Counsel.
Steven M. Swirsky, Esq. and *Stephen A. Ploscow, Esq.,* for the Employer.
Sanford R. Oxfeld, Esq., for United Workers of America.
Ira Sturm, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on August 6 to 8, 1996. The charge and amended charges in Case 29–CA–19578–2 were filed against Planned Building Services, Inc. (PBS), on January 31, April 30, and June 5, 1996. The charge in Case 29–CB–9911 was filed against the United Workers of America (UWA) June 5, 1996. A consolidated complaint was issued in these cases on June 28, 1996. In substance, the complaint alleges as follows:

1. That until December 28, 1995, General Growth Management Company, Inc. (General), had a contract to provide building maintenance services with Prudential, Inc., which was the previous owner of the Smith Haven Mall (the Mall).

2. That Local 32B-32J, the charging party, was the recognized collective-bargaining representative of the employees of General and had a contract with that company effective from January 1, 1993, to December 1, 1995, for the following unit of employees:

> All building service and maintenance employees, including technical employees and watchmen employed by General at the Smith Haven Mall, excluding all public safety officials, office clerical, professional employees and supervisors as defined in the Act.

3. That on or about December 28, 1995, Simon Property Group a/w M.S. Management Associates, purchased the Mall from Prudential and contracted with the Respondent to provide building maintenance services.

4. That pursuant to a hiring scheme designed to avoid having to bargain with the Union, the Respondent refused to hire:

Joan Berliner	Rocco Cappello
Brian Cavagnaro	Joanne Haglund
James Mahoney	

5. That but for its refusal to hire these people, the Respondent's work force at the Mall would have had a majority of its workers being former employees of General.

6. That since December 28, 1995, the Respondent has refused to bargain with the Union as the representative of its employees assigned to the Mall.

7. That since December 28, 1995, the Respondent has unilaterally set the initial terms and conditions of employment which were different than those of General.

8. That by letter dated April 29, 1996, the Union notified the Respondent that it represented a majority of the unit employees and requested Respondent to bargain with it.

9. That by unilaterally establishing different terms and conditions from those of General, the Respondent constructively refused to hire the following individuals.

Adolfo Bauer	Joane Berliner
Rocco Capello	Brian Cavagnaro
Clous Chons	John Coyne
Joyce Coyne	Dominick Dabonne
Joseph Fornero	Jose Galdamez
Frank Grande	Joanne Haglund
Evonne Harrell	Les Krenzer
Robert Madruga	Stephen Merinda
James Mahoney	Robert Portesy
Ron Ritorze	James Sapio
Allan Snickars	

10. That on or about January 15, 1996, PBS granted recognition to the United Workers of America (UWA) for the employees at the Smithtown Mall and entered into a contract effective by its terms from January 15, 1996, to January 14, 2000. This contract required employees to become and remain members of United as condition of employment and also required PBS to periodically deduct and remit dues to that Union on written authorization by the employees.

11. That PBS and UWA entered into the aforesaid agreement notwithstanding that UWA did not represent an uncoerced majority of the Mall employees and notwithstanding that Local

32B-32J had the right to be the bargaining representative of such employees.

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, which is headquarted in New Jersey, provides janitorial services for shopping malls, department stores, apartment buildings, and office buildings. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also agree that the two Unions involved in this case are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The locus of the transactions involved in this case, is the Smith Haven Mall. This is an enclosed shopping area located in Lake Grove, New York.

Before December 1995, Prudential Inc. owned the Mall and a company called General Growth Management Company, Inc. was engaged by Prudential to provide the cleaning and landscaping services at the Mall. The employees of General were represented by Local 32B-32J. The bargaining unit covered by that contract is described above and consisted of about 30 people. The hourly wage rates for those employees, as of January 1, 1995, ranged from $10.47 for utility workers to $13.84 for employees classified as maintenance A workers. The contract also provided for payments on their behalf into pension and welfare funds.

PBS provides cleaning services as a contractor and employs about 600 employees at about 15 locations in the New York, New Jersey, and Connecticut. In some instances, at some locations, the employees of PBS are represented by labor organizations such as UWA and Local 32E, Service Employees International Union. At other locations, the employees are unrepresented.

This case is not the first time that PBS has come into contact with the NLRB, and there is a prior Board Decision involving this Company at 318 NLRB 1049 (1995), involving events occurring in 1992. In that case, PBS replaced another contractor as the cleaning service at a group of five of nine buildings. It hired every applicant previously employed by the predecessor and its work force, on the day it commenced operations, consisted of the prior employees. Based on those facts, the Board held that PBS was a successor even though it took over only a portion of the predecessor's bargaining unit. The Board also held, with Chairman Gould dissenting, that because PBS announced that its job offers were based on changed terms and conditions of employment, it was " free to set the initial terms and conditions on which it would hire Ferlin's employees because the Respondent."

In addition to the finding that PBS was a successor, the Board also concluded that it had illegally assisted another union when it recognized that union, instead of the previous incumbent union, based on authorization cards obtained by coercive statements of union agents and by assistance of supervisory personnel. Concluding that the outside union did not represent an uncoerced majority, the Board held that the Employer violated Section 8(a)(1), (2), and (3) of the Act and that the assisted union violated Section 8(b)(1)(A) and (2) of the Act.

The decision noted above was issued by the administrative law judge on March 15, 1995. and adopted by the Board on September 11, 1995. I note that the judges' decision in that case was issued before PBS began its efforts to obtain the contract at the Smith Haven Mall. Thus, at the time that JoAnn Stratakos, a vice president, was assigned the job of going to the Mall in order to determine what it would cost to provide the cleaning service, PBS would have known that if it began operations with a majority of its work force having been obtained from the existing contractor, PBS would be obligated under Section 8(a)(5) of the Act to bargain with the incumbent union. Although Stratakos denied being aware of this decision, I find this difficult to believe, particularly as it was her job to go out an get new business and to find out all the necessary information in preparation for a bid.[1]

In 1995, Simon Property Group entered into negations with Prudential for the purchase of the Smith Haven Mall. In the spring of 1995, Simon asked PBS to prepare an initial bid. In May 1995, Joanne Stratakos and Willie McDuffie, the vice president of operations, went out to the Mall to make preliminary estimates as to what it would take in terms of manpower and money, to provide this service.

According to Stratakos, she visited the Mall and estimated that it would take about 26 full-time employees to clean the Mall. She also testified that she made inquiries of other local employers in the area and determined that wage rates paid for nonskilled employees would be about $6.50 per hour. Knowing that the cleaning employees working at the Mall were represented by Local 32B-32J, she correctly assumed that the wage rates and benefits enjoyed by the existing work force was far higher than what could be offered in order to obtain a substitute work force.

On June 2, 1995, PBS' CEO, Michael D. Francis, sent a letter to Claude L. LaMontagne, of Simon, in which he stated inter alia:

> Pursuant to our meeting of Thursday, May 25, 1995, pertaining to Smith Haven Mall . . . enclosed herewith please find an original and one (1) copy of our proposed Building Services Contract, pertaining to the mall area, food court and maintenance personnel delineated separately for each category.
>
> As I had mentioned, the following would be included in any final document:
>
> . . . .
>
> 4. In the event that Local 32B/J, as a result of the ambiguous nature of the contracts we have reviewed, is deemed to be the union of record, the Simon Management company shall be responsible for any differential in rates and/or benefits applicable thereto. I suggest that our respective labor counsels meet to go over this in order to alleviate this possibility.

In the Autumn 1995, PBS was notified that it likely would be retained if Simon purchased the Mall. Thereafter, in November 1995, a meeting was held whereby Simon tried to have PBS reduce its bid. At this meeting, Simon's representatives said that December 15, was the expected closing date and that PBS would be required to start cleaning the Mall immediately on

[1] Stratakos was part of PBS' upper management and she reported directly to the Company's CEO, Michael Francis. Since she is charged with duties relating to the acquisition of new business, it is, at least to me, incredible to assume that she would not have been shown and read a Board decision that directly affected the performance of her duties.

completion of the sale. Further delays were encountered and the closing date was ultimately set for December 26. In the meantime and in anticipation of the sale, PBS wrote a letter to Simon on December 4, 1995, which included the following statement:

> It is expressly agreed . . . that Planned Building Services Inc. shall be allocated one (1) specific entrance for both employee ingress and egress from the subject premises. No other access shall be provided or permitted by Planned Building Services' employees. In the event of a violation of this understanding it is agreed by Planned Building Services Inc. that said employee will be subject to immediate dismissal.

The point of the above letter is that PBS was anticipating the possibility of a strike or picketing by Local 32B-32J and was planning to set up a reserve gate for its employees so that the Union would have to confine any picketing activity at that one entrance.

On the morning of December 28, 1995, Simon bought the Mall and PBS commenced its operations.

In preparation for the commencement of operations, PBS hired and made arrangements in December 1995 to have a group of employees ready and in place to start working at the Smith Haven Mall at the very moment that Simon closed the deal with Prudential. In this regard, there were six people who were hired in December 1995 to work temporarily at other locations and thereafter to be assigned to the Smith Haven Mall when PBS commenced operations there.[2] Another five individuals who had never worked for PBS were hired in December 1995, specifically to work at the Smith Haven Mall.[3] Finally, one employee, Jose Munoz, was temporarily assigned to work at the Smith Haven Mall on December 28 and 29, 1995.

According to Stratakos, she planned to interview all of the employees of General and offer jobs, at lower wage rates and benefits, than what they received under the Local 32B-32J contract. Stratakos testified that with the exception of four boiler people who were going to be retained directly by Simon, she intended to offer jobs at PBS to each and every former employee of General who applied. When asked what she would do with the 11 people hired earlier in December if all or most of General's employees accepted employment, Stratakos testified that she would have placed those people at other PBS locations or would have retained a larger than anticipated work force for a period of time and let attrition cure any overstaffing problem.

On the morning of December 28, 1995, General told its employees that its contract had terminated and that they were laid off. After General made this announcement, Ms. Pierpont of Simon told the assembled employees that PBS was taking over the cleaning service, that the four boiler men were to follow her, and that the landscaping work was going to be subcontracted to another company. Stratakos spoke to the former employees and told them that PBS invited them to fill out job applications and that they would be interviewed that day, starting with the third-shift employees. She told them that it didn't matter how long they had worked for General, that all would be interviewed equally and would be considered on their individual merits. When asked about wage rates and other terms, Stratakos said that PBS was offering in the area of about $6.25 per hour depending upon skills. She also told the assembly that PBS was a union shop, that they would get three paid holidays, but that there were no health insurance benefits.

At some point during the morning of December 28, Danielle Sistrunck, a Local 32B-32J representative, appeared at the Mall and met with her members outside the location where the interviews were taking place. The testimony of Joan Berliner, one of the alleged discriminatees, was that Sistrunck told the former employees of General that they should accept any offers of employment made by PBS.

The former employees of General were interviewed by Stratakos assisted by Mr. D'Armas who handed out application forms and helped people with the paperwork. It seems that employees were interviewed in small groups and that these interviews took place from the morning of December 28 until the last interviews which were held in the early afternoon of the same day.

It was stipulated that nine former employees of General were offered and accepted employment by PBS.[4] It was also stipulated that another 12 former employees were offered jobs by PBS but turned them down because the terms of employment were below those paid by General.[5] Another person, James Sapio, did not apply for a job and it was stipulated that the reason was because the terms offered by PBS were lower than what he had received at General. Stratakos testified that another former employee of General, Leslie Krenzer, made an appointment for an interview but never came back to fill out an application.

Needless to say, the Respondent places heavy emphasis on the fact that it made employment offers (albeit at reduced rates) to at least 21 former employees of General; this being strong evidence negating any intent to discriminatorily refuse to hire those employees. The Respondent points out that had all of these people accepted the job offers, it would have been a successor and would have been obligated to bargain with Local 32B-32J.

The General Counsel presented a number of witnesses who testified about their interviews on December 28 and whose testimony is relied on to show an illegal plan.

Rocco Cappello was employed by General and operated a vehicle which swept the parking lot. He was also the shop steward for Local 32B-32J. He testified that early in the interviewing process, Stratakos called out the names of Dabonne and Snickers who operated sweepers whereupon he went up to the desk and said that he too was a sweeper. He testified that she said that she would interview him but that PBS needed only two sweepers. According to Cappello, he asked to talk privately to the two other men but she refused. He asserts that Stratakos then said that Cappello wouldn't fit in and that she didn't need him. At this point according to Cappello, he asked for the return of his application because it contained personal information and she returned it. She also asked him to sign a form (which he did) stating: "I have been given an application

[2] These were Enrique Angulo, Manuel Arrascue, Almedina Dias, Basilo Marrero, Jaime Rodriguez, and Carlos Serrano. (G.C. Exh. 11.)

[3] These were Gerrardo Popater, Hector Portorreal, Pablo Ramos, Tomas Silvestre, and Mario Susana. (G.C. Exh. 11.)

[4] These were Fernando Beltran, Rocco Cali, James Harrell, Joseph Higgins, Frank La Jara, Edward McDonald, Michael Smith, Richard Smith, and Al Snickars. As to Snickars, it appears that although he initially accepted the job he decided to quit on December 29, 1995.

[5] These were Adolfo Bauer, Claus Schons, Dominic Dabonne, Joseph Fornerio, Jose Galdamez, Frank Grande, Evonne Harrell, Leslie Krenzler, Robert Madruga, Stephen Mirenda, Robert Portesy, and Ron Ritorze.

by Planned Building Services, Inc. and chose not to fill it out at this time."

Stratakos testified that there was one sweeper vehicle and that she planned to use two people for its operation. She testified that when Dabonne and Snickars came forward, Cappello also came up and said that he too was a sweeper. Stratakos testified that she gave him an application and asked him what else he did. She states that when he said that he also did some landscaping, she told him that PBS did not get that part of the work. According to Stratakos, Cappello asked to talk to the other two men privately and she refused, stating that she was too busy, whereupon he asked for his application back. Essentially, her version of this interview is the same as Cappello's, except that she denies that she was aware that Cappello was the shop steward for Local 32B-32J. Both Snickars and Dabonne were offered jobs at $9 per hour. Initially they both accepted the jobs, although Dabonee rejected the offer later in the day, and Snickars quit on the day after.

John Mahoney testified that he was employed by General primarily to do outside landscaping at the Mall and was paid at the rate of $9.86 per hour. He testified that when he was interviewed, Stratakos told him that she would like to offer him a job but could not because she had all the people that she needed. Mahoney then testified that she told him that the only work that she had available for him was as a porter at $6.25 per hour and that he thought that this was a "little low." He states that she told him that some people might quit and that he might then get a job later on.

In Mahoney's case, I thought that his testimony was somewhat confusing and I think that what happened was that because he had worked at a job that was not part of PBS's contract, he was told, in essence, that the company had all the workers it needed for the work it had contracted for, but nevertheless offered him a job, as a porter, at $6.25, which he turned down.

The final interviews for the day were scheduled for Joan Berliner, John, and Joyce Coyne, Joanne Haglund, and Brian Cavagnaro, all of whom had worked on the afternoon crew for General. By the time that these interviews took place, the company had made job offers to about 22 former General employees (including Mahoney), 9 had accepted and 2 had not filled out applications. Thus, immediately prior to these last interviews, PBS had a total complement at hand of 23 people. Eleven of these people were essentially new hires, 9 were former General employees, 1 was a PBS employee temporarily transferred to this location, and 1 (Dabonne) had accepted an offer but rejected it later that afternoon.

The afternoon interviews started out with Joan Berliner, Joyce and John Coyne and they were soon joined by Brian Cavagnaro, and JoAnn Haglund.

According to Berliner, they were told by Stratakos that PBS was paying $6.50 per hour without benefits, except for 3 holidays a year. Berliner states that she asked Stratakos why she didn't sit down with Local 32B-32J and work out an agreement because everyone needed their jobs. She states that immediately before Cavagnaro entered the room, Stratakos decided to confide in them and explained that she could not hire too many of the former employees or they would bring the Union back in. She states that after Cavagnaro entered the room, Stratakos asked if he could be trusted, and when told that he could, she said that she didn't want anyone telling the union representative what was being said, and then went on to say that if she hired a majority of the people, they would vote the Union back in. According to Berliner, she told Stratakos that Rocco Cappello needed a job because he had six children, to which Stratakos responded; "Rocky is trouble, he was the shop steward and [PBS] didn't want anything to do with [the] Union." She testified that Stratakos said that Rocky was out because he was for the Union and that Melvin and Simon (the owners of PBS and Simon), definitely didn't want any union workers except for a union called United. (United Workers of America.)

Berliner testified that during this meeting, Stratakos said that the Company's policy was not to hire husbands and wives together. Berliner also testified that Stratakos offered her a job at $6.50 an hour and that she believed that Stratakos also offered a job to John Coyne.

The statements attributed to Stratakos were, to a significant degree, corroborated by the Coyne's, Cavagnaro, and Haglund. In essence, they testified that Stratakos said that the company didn't want to hire a majority of General's employees because that would mean that the Union would be voted back in. They also testified that Stratakos said that there already was a union for the shop and that Rocco wasn't hired because he was a troublemaker.

Notwithstanding the above, it appears from the testimony of the General Counsel's witnesses, that two of the five individuals were offered immediate employment at the meeting (Joan Berliner and John Coyne) and one was definitively rejected, (Joyce Coyne). John Coyne said that he could not immediately accept employment because he had booked a cruise for himself and his wife and would not be available until January 8. He testified that Stratakos told him to call her when he returned but that he did not call because he heard what the company was offering. (John Coyne testified that he first called in April 1996 and was unsuccessful in reaching Stratakos or in having his call responded to.)

On the evening of December 28, 1995, Stratakos called Berliner and Haglund and offered both immediate employment. In Berliner's case, Stratakos offered $7 per hour and when Berliner asked for $8 per hour, she told Berliner that she would get back to her the following day. She didn't. In Haglund's case, she testified that Stratakos offered her employment starting the next day and also asked if she was willing to sign a card stating that she was no longer represented by the Union. Haglund testified that she told Stratakos that she would have to think about it and thereafter had no further contact with her or the company.

Brian Cavagnaro testified that he was told by Stratakos that she would give him a call in the future (either by December 29, 1995, or by January 15, 1996). He testified that she took his information on a piece of paper and that he did not fill out an application form although he wanted to. According to Cavagnaro, he called PBS sometime after January 20, 1996, and left a message that he was looking for a job. He states that he asked for Stratakos and asked that she call back. He states that she did not.

Stratakos testified that Berliner asked why she didn't talk to the Union's business agent and to Rocco, the shop steward who had six kids and needed the job. Stratakos states that she responded that he didn't need the job enough to leave an application. According to Stratakos she told the Coynes that the company had a policy of not hiring husbands and wives together and she explained that this was to prevent situations where the Mall would be short handed when both husband and wife

wanted to take vacations at the same time. With respect to Cavagnaro, Stratakos testified that she asked if he wanted an application and he took a piece of paper, wrote his name and address on it and also wrote," call me January 20." (See Emp. Exh. 6.) As to Haglund, Stratakos testified that she told Haglund at the meeting that she would hire her in a week's time.

Stratakos denied making the antiunion statements attributed to her by these witnesses.

Daniel McCole, a former supervisor of General was also called as a witness by the General Counsel. He testified that he was asked and agreed to assist Stratakos for the transition. He also testified that on December 28, he asked Stratakos how come more union people were not being hired and that she said that if she offered more than 50 percent of them jobs, the Union could be voted back in. McCole's pretrial affidavit, was slightly different from his testimony in the sense that it said that Stratakos told him that she could not hire all of the people because if she did, they would vote the union in. This conversation was denied by Stratakos and the Respondent's counsel noted McCole's testimony that he came to the hearing every day with the group of employees whose testimony he corroborated. (The Coynes, Berliner, Haglund, and Cavagnaro.)

By the week ending December 30, 1995, PBS employed 23 nonsupervisory people at the Mall. Reviewing payroll records for the pay periods from December 30, 1995, to June 29, 1996, these show that the number of employees fluctuated between 23 and 26, but mostly being 23 or 24 people.

On or about January 15, 1996, PBS entered into a collective-bargaining agreement with the United Workers of America which ran for a term from January 15, 1996, to January 14, 2000. This contract requires employees to become and remain members of UWA after being employed for 60 days. It also required the employer to check off and remit dues and initiation fees for any employee who authorizes such check offs.

There is no dispute that the employees hired by PBS for the Smith Haven Mall were solicited for membership in UWA by supervisory personnel of PBS. As such, that Union did not represent an uncoerced majority of PBS's employees in the Smith Haven Mall unit.

III. ANALYSIS

A. Contentions of the Parties

In preparation for bidding for and thereafter taking over the cleaning services at the Smith Haven Mall, PBS made plans. Whether those plans encompassed illegal actions is the question presented in this case. To the extent that PBS' plans were clear and unambiguous, the following elements were present.

1. To obtain a clause in its contract with Simon (the Mall owner) guaranteeing that if Local 32B-32J was found to be the "union of record," Simon would pay any differential in rates caused by such a determination.

2. To offer jobs to employees of General in accordance with local market conditions and at rates of pay and a level of benefits well below what they were getting per the contract between Local 32B-32J and General.

3. To hire, before taking over the operation, a group of 11 employees to work at the Mall on a permanent basis. (With an 12th there on a short-term basis.)

4. To ensure that all employees hired to work at the Mall signed authorization cards for another union and to recognize that union shortly after the commencement of operations.

5. To provide for the establishment of reserve gates in the event that Local 32B-32J engaged in any picketing at the Mall.

Beyond the above, the General Counsel and the Charging Party assert that PBS's plans also included an intention to make sure that its work force at the Mall was comprised of less than 50 percent from the former employees working there and that it intended to refuse to employ any employees of General who would have resulted in the prior employees being more than 50 percent of the new work force. They assert that inasmuch as PBS planned to refuse to hire employees in order to avoid a successorship obligation to bargain with Local 32B-32J, it could not unilaterally set initial wage rates and terms below those contained in the Local 32B-32J contract with General and, therefore, to the extent that General's employees did not apply for jobs at PBS because of the lowered rates, this constituted a "constructive" refusal to hire in violation of Section 8(a)(3) of the Act.

The company counters that except for the boiler employees who were hired by Simon and except for one other instance, it offered jobs to *all* of General's employees who actually applied for the jobs. The Company contends that if, under the applicable case law, it was entitled to establish the initial terms of employment, and if it offered jobs to virtually all of the predecessor's employees under such terms, it cannot be held to have violated Section 8(a)(3) and (5) if the number of those employees who accepted the offers comprised less than 50 percent of the new work force.

Regarding the testimony of the General Counsel's witnesses, the Respondent asserts that their testimony was inherently incredible as it is impossible to believe that Stratakos (an intelligent woman) would have been so stupid as to confide to a group of strangers that she was engaged in illegal conduct by telling them that the Company would not employ more than 50 percent of General's employees in order to avoid Local 32B-32J being voted back in.

While not articulated, the employer might argue that whatever the Company's hopes of avoiding being a successor, it nevertheless did not engage in any overt conduct which violated the law because although it may have hoped (and even anticipated) that General's employees would, for the most part, refuse to accept employment, it nevertheless made offers to substantially all who applied.

B. The Assistance Allegations

In May 1994, PBS entered into a 3-year contract with the United Workers of America which purported to cover all of the Company's building service employees employed at "all malls and/or department stores located throughout the States of New Jersey, New York, Connecticut, and Massachusetts."

Notwithstanding that language, it is clear to me that the employees of the Smith Haven Mall would constitute a separate appropriate unit and could not be an accretion to the broad geographic unit which is supposedly encompassed by the above described agreement. See for e.g., *Sav-On Drugs,* 267 NLRB 639 (1983). Indeed, when PBS and UWA signed a contract on January 15, 1996, that contract covered the employees of the Smith Haven Mall as a separate unit.

Despite the fact that a majority of the Smith Haven employees of PBS signed authorization cards designating UWA as their representative, the evidence shows that these cards were obtained through the solicitation of PBS's management and supervisors. And as such they were not valid and cannot be

counted toward demonstrating UWA's majority status. *Sara Neuman Nursing Home*, 270 NLRB 663 (1984). See also *Plumbers Local 636 (Detroit Assn. of Plumbing Contractors) v. NLRB,* 287 F.2d 354 (D.C. Cir. 1961); and *A.M.A. Leasing*, 283 NLRB 1017 (1987).

Inasmuch as the Smith Haven Mall employees are not an accretion to any preexisting valid collective-bargaining unit, and inasmuch as PBS's recognition of UWA was not based on that Union having the consent of an uncoerced majority of the employees, the Company violated Section 8(a)(1) and (2) of the Act by granting such recognition and the Union violated Section 8(b)(1)(A) of the Act by accepting such recognition. *Ladies' Garment Workers v. NLRB,* 366 U.S. 731 (1961); *Sav-On Drugs*, supra; *Save-It Discount Foods*, 263 NLRB 689 (1982) (extension of contract to a new store where union didn't represent uncoerced majority); *King Radio Corp*., 257 NLRB 521 (1981) (extension of union agreement to facility that had traditionally been excluded from the bargaining unit when union didn't represent uncoerced majority at that facility).

Further, as the collective-bargaining agreement that was executed on January 15, 1995, contains a union-security clause requiring employees to become members and pay dues and initiation fees as a condition of employment, the Company has violated Section 8(a)(3) of the Act and the Union has violated Section 8(b)(2) of the Act. *Sav-On Drugs,* supra.

C. The Successorship Issues

Whether or not a new company such as PBS which acquires or takes over the operations of a predecessor is a "successor" having an obligation to recognize and bargain with an incumbent union, depends on whether there is a "substantial continuity" of operations and if a majority of the new work force, in an appropriate unit, consists of the predecessor's employees when the new employer has reached a "substantial and representative complement." *Fall River Dyeing Corp. v. NLRB,* 482 U.S. 27 (1987).

Consistent therewith, if the new company's work force contains less than 50 percent of the predecessor's employees but only because the new employer has refused to hire such employees in order to evade a "successorship" obligation, then such refusals to hire would constitute violations of Section 8(a)(3) of the Act and the employer's refusal to bargain would constitute a violation of Section 8(a)(5) of the Act. Thus, in *Galloway School Lines*, 321 NLRB 1422 (1996), the Board held that the employer was a successor where, but for its illegal refusals to hire the predecessor's employees, they would have constituted a majority of the new work force. The Board noted:

> [T]he alleged successor employer's motive is the critical issue. Within the *Wright Line* framework, there are several factors which the Board has considered in analyzing the lawfulness of the alleged successor's motive: expressions of union animus; absence of a convincing rationale for the failure to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force. . . .
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> . . . .
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> Therefore . . . we agree . . . that the Respondent' s asserted "random-selection" process was a subterfuge, that its failure to hire the alleged discriminatees in this case was part of a plan to avoid bargaining obligations respecting the entire driver/monitor unit under the Burns successorship doctrine, and that it violated Section 8(a)(3) and (1).[6]

Assuming that a new company becomes a successor, the next issue is what are its obligations and/or rights in relation to the establishment of the initial terms and conditions of employment. Clearly, unless the new company voluntarily and with the consent of the Union, assumes the predecessor's collective-bargaining agreement, it has no *contractual* obligations to the employees or the Union. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). This is because the new employer has never had a contractual relationship with the Union in the first place and the Board under *H. K. Porter Co., v NLRB*, 397 U.S. 99 (1970), has no authority to impose contractual terms on the parties to a collective-bargaining relationship.

There has nevertheless been an issue as to what should be the start up terms for the work force when a new employer is deemed to be a successor. If the new employer is free to establish the initial terms, then even though it is obligated to bargain, the Union will be in the position of seeking to increase the wages and benefits from that base. On the other hand, if the employer is obligated to continue the predecessor's wages and terms until an agreement or impasse is reached, it will be the employer that will be seeking to bargain down from the existing base. From a practical point of view, it is much to the advantage of a union (and disadvantage to the employer) to start out from the status quo ante (represented by the old employer's terms) and to compel the new employer to bargain for a reasonable period of time before implementing any new terms and conditions until an impasse is reached.

Another problem is that if the new employer is required to retain the terms and conditions of employment as defined by the predecessor's contract, does that mean that it must pay moneys into a union's health insurance or pension fund in the absence of a contract? If so, would the result be contrary to the provisions of Section 302(c) of the Act which bars such payments in the absence of an existing written agreement with the employer? (As opposed to a bargaining relationship.)

In *NLRB v. Burns Security Services,* 406 U.S. 272 (1972), the Court stated:

> We also agree . . . that holding either the union or the new employer bound to the substantive terms of an old collective bargaining contact may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms . . . contained in the old . . . contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm.
>
> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition,

[6] See also *Harvard Industries*, 294 NLRB 1102 (1989).

> reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract.

The Court then went on to set out a limited exception to the rule when it stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employee's bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the union as required by Section 9(a).

It is not all that clear to me what the rationale is for reaching differing results regarding initial terms, where a successor's hires 100 percent of the predecessor's work force as opposed to say, 65, 75, 85, or 95 percent of that work force. What if, for example, the successor decides to hire all of the predecessor's employees but immediately expands the complement to meet projected market conditions so that the predecessor's employees comprise say 60 percent of the new work force? What is the result if the employer intends to hire all of the predecessor's employees but is required to hire additional workers when he finds out that only a portion of the previous work force will accept employment?

Subsequent to *Burns*, the Board held that even where the new employer takes over all of the former employer's employees, it still may establish initial terms and conditions if it announces this intention to the employees at the time they are interviewed and/or hired. Thus in *Spruce Up Corp*., 209 NLRB 194, 195 (1974), the Board stated that the *Burns* "perfectly clear" caveat should

> be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in thier wages, hours or conditions or employment , or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

The *Spruce Up* doctrine was reaffirmed by the Board in *Planned Bldg. Services,* 318 NLRB 1049 (1995), where the Board, after finding that PBS was a successor, concluded that where the Respondent's representatives told the predecessor's employees at the outset that benefits would not be the same, that it was free to set the initial terms and conditions on which it would hire the predecessor's employees "because the Respondent made a lawful *Spruce Up* announcement." (Chairman Gould dissented and opined that *Spruce Up* should be overruled.

The other side of the coin can be seen in *Kirby's Restaurant*, 295 NLRB 897, 901 (l989), where the administrative law judge concluded that a successor, while having no obligation to bargain before establishing initial terms and condition, violated the Act when it unilaterally changed terms and conditions that it continued in effect after the takeover.

In *Canteen Co*., 317 NLRB 1052 (1995), the new company, prior to interviewing employees, told the union representing the predecessor's employees that it wanted the predecessor's employees to serve a probationary period and the union agreed. In its discussions with the union, the Respondent did not mention anything about making any changes in the initial terms and conditions and the Board, stated:

> We agree with the judge that the Respondent violated Section 8(a)(5) of the Act when, on or after June 23, the Respondent told three of the four predecessor employees that they could continue working the food services operation, but at significantly reduced wages. Specifically, we find that by June 22, when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. Therefore, as it was "perfectly clear" on June 22 that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

This leads us to another line of cases that are an outgrowth of the *Burns* successor decision. The Board has uniformly held that an employer will be a successor when, but for its illegal refusal to hire persons employed by the predecessor, a majority of the new work force would have consisted of the predecessor's employees. *Laro Maintenance v. NLRB*, 56 F.3d 224 (D.C. Cir. 1995); *Harvard Industries*, 294 NLRB 1102 (1989); *U.S. Marine Corp*., 293 NLRB 669 (1989); Moreover, where there has been an illegal refusal to hire employees of the predecessor, the Board has, in effect, made the assumption that, but for the illegal discrimination, the new employer would have hired all of the predecessor's employees. And based on this assumption, it has used the illegal refusals to hire to apply the "perfectly clear" exception stated by the Court in *Burns*. Thus, in *U.S. Marine Corp*., supra, the employer refused to hire 34 of the predecessor's employees and did so in order to keep the number of the predecessor's employees below 50 percent of the full complement. In ordering the Respondent to rescind all detrimental unilateral changes that occurred upon the takeover, the Board stated:

> We have found that the Respondents unlawfully discriminated against 34 of the predecessor's former employees by refusing to hire them. Accordingly, we conclude that absent their unlawful purpose, the Respondents would have retained substantially all the predecessor's employees, and therefore the Respondents were not entitled to set initial terms of employment without first consulting with the Union. [Citations omitted.][7]

[7] It is noted that in *U.S. Marine Corp*., the Board ordered, inter alia, that the respondents restore the preexisting terms and conditions of employment, including contributions to employee benefit plans. The Board ordered the respondent to make whole the benefit plans for payments not made and to continue to make such payments until they negotiated in good faith with the union to agreement or to impasse. Thus, whatever concerns I might have as to any conflict with Sec. 302(c) of the Act, these were not shared by the Board in the *U.S. Marine Corp*. case.

Subsequent to the hearing in the present case, the Board issued its decision In *Galloway School Lines,* 321 NLRB 1422 (1996). In that case, Galloway was a company that successfully underbid Laidlaw Transit, Inc. for a contract to operate schoolbuses in Coventry Rhode Island. On receipt of the bid, the union that represented the predecessor's employees, wrote to Galloway and said that the employees would like to continue to be employed. After putting advertisements in the papers, Galloway hired 28 drivers, 14 of whom were former Laidlaw employees. (It refused to hire between 11 and 16 of the predecessor's drivers.) Galloway also hired 27 monitors from a pool of 55 applicants, of whom 18 were new people and 9 were former employees of Laidlaw. Fourteen former Laidlaw monitors who applied for these jobs were rejected. The administrative law judge credited testimony that the respondent's president told applicants "that his company was not union, that it would never be union, that he would not hire union, and that he would do whatever he could to stay nonunion." Without going into details, the Board concluded that the respondent had devised a plan pursuant to which it refused to hire those of the predecessor's employees who were employed as monitors in an effort to avoid becoming a successor.

The reason that the *Galloway* case is somewhat unusual is that the complaint did not allege that Galloway had illegally refused to hire any of the drivers and a charge making that allegation had been dismissed by the Regional Director. Thus, unlike *U.S. Marine,* supra, it could not be said that absent the unlawful refusals to hire, the new company would have hired all or substantially all of the predecessor's employees. To reach the result it did, the Board, with Member Cohen dissenting, concluded that when the Supreme Court, in *Burns*, stated the exception that a successor might not be able to unilaterally establish its initial terms and condition when it "is perfectly clear that [it] plans to retain all of the employees in the unit," the Supreme Court did not really mean to have those words read literally. Rather, the Board concluded that the Court meant to say that an employer must first bargain with a union which represented the predecessor's employees, about initial terms when, it is "evident that the union's majority status will continue." Therefore, applying this interpretation, the Board held that even though it was clear that the employer did not intend to hire all of the predecessor's work force (and at least with respect to the drivers, without illegal motivation) that but for the employer's discriminatory refusals to hire the former monitors, a majority of the total new work force would have been composed of the predecessor's employees. The Board stated:

> [W]e resolve the uncertainty in the instant case against the Respondent and infer that, but for its unlawful scheme, the Respondent would have planned from the outset to employ a sufficient number of Laidlaw employees to make it evident that the Union's majority status would continue. Thus, we find that the Respondent was obligated to consult with the Union prior to setting initial terms that were different from the predecessor's terms.

Does *Galloway* overrule *Spruce Up*? I don't think so. *Spruce Up* was reaffirmed less than a year before the Board's decision in *Galloway*. Although we know that Chairman Gould expressed his opinion in *Planned Bldg. Services* that *Spruce Up* should be overruled, Board Members Browning and Truesdale did not agree. And although Member Browning, along with Chairman Gould, issued the majority decision in *Galloway*, they did not indicate that this decision was meant to overrule *Spruce Up*. This being the case, I would surmise that the present rule in successorship cases is that absent discriminatory refusals to hire the predecessor's employees, the new company, even if it intends to hire all or substantially all of the predecessor's employees, will nevertheless be entitled to establish its own initial terms of employment if this are announced before the hiring process begins.

The General Counsel and the Charging Party's counsel make an ingenious argument for the proposition that the Respondent's had a plan in this case to avoid being a successor and that under this plan it *would have* refused to hire a sufficient number of the former General employees to avoid becoming a successor. They cite the illegal assistance to another union,[8] and the prehiring of outside employees before interviewing the predecessor's employees. They also cite the testimony of McCole, a former supervisor of General, and five former General employees who stated that they were told by Stratakos that she was going to hire less than 50 percent of the former employees in order to prevent the Union from being voted back in.

While my subjective reaction to at least some of these witnesses was favorable, it seems to me that the General Counsel's case has to overcome one rather huge obstacle. And that is that Stratakos did not refuse to interview any former employee of General who asked to be interviewed, and she did not, with the exception of Joyce Coyne, refuse to hire any of those people. In the case of Joyce Coyne, Stratakos had at least a rational explanation as to why she refused to make her an offer; namely that the policy of PBS was not to hire members of the same family for the same location.

Thus, the testimony of John Coyne, Berliner, and Haglund was that by the evening of December 28, 1995, Stratakos had offered jobs to each of them. And the testimony of Brian Cavagnaro was consistent with Stratako's testimony that he told her that he would not be available until January 20, 1996.

As to Mahoney, the evidence shows that his job at General was as a landscaper and that this was a job that was not part of PBS's contract with the Mall's owner. The evidence tends to establish that when he was told that his old job was not available and that the only job available to him was as a porter, he declined the offer.

Similarly, when Rocco Cappello sought to obtain a job as a sweeper operator, Stratakos had planned to use only two people to operate this machine and Cappello was one of three people employed by General to do this work. Moreover, he did this on a part-time basis, spending the remainder of his time on landscaping. When he was told by Stratakos that she needed only two people to do the sweeper job, he asked to speak privately to the two other employees and was refused. At this point, he took back his job application and signed a statement indicating that he was not interested in seeking employment with PBS. When he withdrew his application, Stratakos hired Snickars and Dabonne to do this work. Thus, despite testimony by the Coynes, Berliner, Haglund, and Brian Cavagnaro purporting to show that Stratakos intended to deny employment to Cappello

[8] In *Laro Maintenance v. NLRB*, supra, 56 F.3d 224 , the court upheld the Board's decision that the Respondent unlawfully refused to hire 134 represented employees. The court noted the Board could rely on the evidence of the employer's hiring practices at other sites and the evidence that the employer violated Sec. 8(a)(2) by unlawfully recognizing another union.

because he was the shop steward and a "trouble maker," the objective facts show that she never actually refused to make him an offer for some type of job because he refused to apply.

If the Union had forcibly instructed its members to accept the job offers no matter what terms were offered, and had the employees followed orders, we would have seen what the Respondent would have done. If it had terminated the interviewing process or refused to hire any more of the predecessor's employees after hiring the first 11 or 12 applicants, we would have a better answer to the General Counsel's speculation. For better or worse, this did not happen and we are left with the objective facts that despite the Charging Party's and the General Counsel's theory, and the testimony of their witnesses, the Respondent did, in fact, make job offers to every one of the predecessor's employees (except Joyce Coyne) who applied for a job and who indicated that they were available for work. Most of the former employees of General either refused the job offers or did not apply. Of the people who did apply, nine were hired.

The evidence, while suggestive of a possible plan by which the Respondent *hoped* to avoid becoming a successor, the evidence, in my opinion, is simply not enough to establish that the Respondent acted in a discriminatory manner by refusing employment to any of the predecessor's employees because of their union affiliation. Maybe it should be considered a "sin" to hope for such an outcome. But it is not a violation of the law to hope for something, unless the Respondent acts in an illegal manner to carry out an illegal plan.

In the absence of sufficient evidence showing that the Respondent illegally refused employment to the predecessor's employees, the Respondent, pursuant to the *Spruce Up* decision, was entitled to determine, unilaterally, its initial wages and terms and conditions of employment as long as it announced this prior to the hiring process. This is precisely what happened in the present case and PBS informed the former employees, before they were interviewed, that it was going to offer jobs at about $6.25 to $6.50 per hour and without other benefits.

Since the Respondent was entitled to establish its initial terms and conditions of employment, it follows that it did not illegally discriminate against those persons who refused to accept job offers because the terms of employment varied from those that they enjoyed under the contract with Local 32B-32J. Accordingly, I cannot agree with the General Counsel's interesting theory that those people who did not apply for jobs, or who rejected job offers, were constructively refused employment in violation of Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By recognizing the United Workers of America at time when that labor organization did not represent an uncoerced majority of its employees employed at the Smith Haven Mall, Planned Building Services, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (2).

2. By having its supervisors solicit union authorization cards on behalf of United Workers of America, Planned Building Services, Inc. violated Section 8(a)(1) and (2).

3. By entering into a collective-bargaining agreement with United Workers of America, containing a union-security clause and a provision requiring the Company to remit dues and initiation fees to that Union, the Company violated Section 8(a)(1), (2), and (3) of the Act.

4. By accepting recognition and entering into a collective-bargaining agreement with the Company containing union-security and checkoff provisions, the United Workers of America violated Section 8(b)(1)(A) and (2) of the Act.

5. By engaging in the aforesaid conduct, the Company and the UWA have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as otherwise found herein, the Respondents have not violated the Act in any other manner encompassed by the complaint.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that the employer be ordered to withdraw and withhold recognition from UWA for the employees at the Smith Haven Mall and to cease and desist from giving force or effect to any collective-bargaining agreement covering those employees, unless and until that Union is certified by the Board as the collective-bargaining representative of the employees at that location. However, nothing herein shall be construed to require the Employer to vary any wage or other substantive terms or condition of employment which has been established in the performance of the contract.

It is further recommended that UWA be ordered to cease and desist from acting as the bargaining representative of the aforesaid employees or giving effect to its contract with the employer unless and until it is certified by the Board as the collective-bargaining representative of the employees at that location.

It is additionally recommended that the employer and UWA be ordered, jointly and severally, to reimburse all present and former employees employed at the Smith Haven Mall who joined the Union, for all initiation fees, dues, and other moneys which may have been exacted from them together with interest thereon as set forth in *Florida Steel Corp*., 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [9]

ORDER

A. The Respondent, Planned Building Services, Inc., Smith Haven, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing and bargaining with the United Workers of America at a time when that labor organization did not represent an uncoerced majority of the employees employed at the Smith Haven Mall, unless and until that labor organization is certified by the Board as the collective-bargaining representative of such employees.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Having its supervisors solicit union authorization cards on behalf of United Workers of America or any other labor organization.

(c) Entering into or giving force and effect to a collective-bargaining agreement with United Workers of America covering the employees at the Smith Haven Mall, unless and until that labor organization is certified by the Board as the collective-bargaining representative of such employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withhold recognition from the United Workers of America as the representative of its employees at the Smith Haven Mall unless that Union has been certified by the Board as their exclusive collective-bargaining representative.

(b) Jointly and severally with the United Workers of America, reimburse all former and present employees employed at the Smith Haven Mall for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its Smith Haven, New York facilities, copies of the attached notice marked "Appendix A and Appendix B."[10] Copies of the notice which is Appendix A, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Smith Haven Mall at any time since December 28, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, United Workers of America, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the collective-bargaining representative of the employees of Planned Building Services, Inc., at the Smith Haven Mall, unless and until it is certified by the Board as the collective-bargaining representative of such employees.

(b) Maintaining or giving any force or effect to any collective bargaining agreement between it and the employer covering the employees at the Smith Haven Mall, unless and until it is certified by the Board as the collective-bargaining representative of such employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Planned Building Services, Inc., reimburse all former and present employees employed at the Smith Haven Mall for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its offices and meeting halls, copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Planned Building Services, Inc., at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

James P. Kearns, Esq., for the General Counsel.
Steven M. Swirsky, Esq. and *Stephen A. Ploscow, Esq.,* for the Employer.
Sanford R. Oxfeld, Esq., for United Workers of America.
Ira Sturm, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On November 22, 1996, I issued a decision in the above-captioned cases finding, inter alia, that the Respondent, Planned Building Services, Inc. (PBS), did not violate the Act by failing and refusing to hire employees of a predecessor for discriminatory reasons. In this regard, I concluded that when it took over the operations of the predecessor (which had a collective-bargaining agreement with the Charging Party) it offered, with one exception, jobs to every one of the predecessor's employees who applied for these jobs, albeit on its own terms and conditions of employment. Accordingly, the objective and undisputed evidence (as opposed to alleged and disputed conversations) was that because many of the predecessor's employees either rejected offers of employment or refused to apply for the jobs, the Respondent's work force, after it commenced operations at the Smith Haven Mall, did not employ a majority of the predecessor's employees.

On May 6, 1997, the Board remanded this matter to me to make explicit credibility findings as between the testimony of certain of the General Counsel's witnesses and the Employer's witness, Joanne Stratakos.

Notwithstanding the fact that with one exception, Stratakos offered jobs to all of the predecessor's employees who applied,

[10] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11] See fn. 10, supra.

there was testimony by some of the General Counsel's witnesses who asserted that at a group interview between themselves and Stratakos, she confided to them that she could not hire too many people who had worked for the predecessor because if she did, the Union would come back in. (Testimony of Joan Berliner, Joanne Haglund, John and Joyce Coyne, and Brian Cavagnaro.)

This group of employees (with the exception of Cavagnaro, who apparently showed up late for the interview) also testified that Stratakos said that Rocco was a troublemaker and that the principals of PBS didn't want to have anything to do with the Union. The implication of their testimony being that Stratakos confessed to them, during this group interview, that she did not offer a job to Rocco Cappello because he was the union shop steward.

Joanne Haglund testified that on the night of December 28, Stratakos offered her a job beginning on December 29 but asked her, as a condition of being hired, if she would be willing to sign a card stating that she no longer belonged to the Union.

Finally, Cavagnaro testified that he was available for immediate employment but that Stratakos, on the afternoon of December 28, refused to give him an application and instead asked him to write his name, address, and phone number on a piece of paper. He testified that she told him to give her a couple of weeks because she couldn't hire too many people at once. He asserts that he wrote on a piece of paper, "call me January 20," because Stratakos made it clear that she would not offer him a position immediately. It seems that none of the other persons who were involved in the group interview heard or were present when this conversation between Cavagnara and Stratakos allegedly occurred.

Joanne Stratakos denied all of the above statements. She also denied that she was aware, prior to interviewing him, that Cappello was the shop steward. And if one were to ask me if I could state with a degree a certainty who was telling the truth, my answer would be no. In making my determination as to credibility, I have considered not only demeanor, but also the probabilities given my 30-plus years of experience in this area of the law. And among other things, my experience tells me that the recollections of oral statements are not always reliable even when honestly held. That is, people may hear things that they assume were meant even if the precise statement was not made. Also people accused of making illegal statements may honestly remember that they did not make them in the manner alleged, even when it is clear that they did. In my opinion, it is preferable to rely, where possible, on objective and nondisputed facts on the theory that actions speak louder than alleged words. It also is my opinion that with respect to credibility issues, it is the General Counsel who has the burden of persuasion.

In this case I am going to credit the testimony of Joanne Stratakos regarding the above statements that she allegedly made.

As I pointed out in my earlier decision, the Respondent had been involved in a prior NLRB case involving the issue of sucessorship. A decision in that case was issued on March 15, 1995, and was adopted by the Board on September 11, 1995. In addition, the evidence shows that the company consulted with labor counsel before it entered into the contract to provide cleaning services for the Smith Haven Mall. While obviously not privy to attorney-client communications, it seems probable that Stratakos would have been aware of at least the rudiments of what was legal and illegal under the NLRA in a situation that was going to be similar to what had happened in the prior NLRB case. In this light, the assertion that she told people who were strangers to herself and who were potentially aligned in interest against the Respondent, that the Company was not going to hire some of the predecessor's employees in order to avoid having the Union come in, is to assume that she either is a remarkably stupid woman or someone whose lack of self control would permit her to blurt out such a damaging admission to a group of employees. In my opinion, Stratakos was neither stupid nor without self control. Is it possible that she made such statements? Yes. Is it probable? In my opinion, no.

Second, notwithstanding these claimed statements, Stratakos did in fact, make employment offers to all of the predecessor's employees (except for Joyce Coyne), who applied for jobs.[1] (In this regard, I credit her testimony that Cavagnaro was the one who stated that he would not be available until January 20).[2]

The Coynes, Haglund, and Berliner testified that at the group interview on December 28, Stratakos made a statement that she would not offer a job to Rocco Cappello because he was the union steward and a troublemaker. However, the testimony of Cappello was that she did not offer him a job as a sweeper-driver after telling him that she needed only two sweeper-drivers; that he didn't fit in and that she didn't need him. The fact is that at the time that Cappello had this conversation with Stratakos, she was in the process of interviewing the predecessor' two full-time sweeper-drivers, Dabonne and Snickars and they were offered employment. (Cappello had done that job on a part-time basis.) And when Stratakos told him that she needed only two sweeper-drivers, he asked for the return of his application. It seems to me that it is improbable that Stratakos would have told a group of other job applicants, later in the day, that she would not hire Cappello because he was the union steward and a troublemaker, when it not disputed that he asked for his application back and therefore refused to apply for a job.

Haglund testified that on the evening of December 28, Stratakos called her and offered her a job on the condition that she sign a card stating that she no longer belonged to the Union. Nothing like this was mentioned by any other witness in this case and I shall credit Stratakos' denial of this allegation.

As I indicated in my previous decision, I do not believe that the Company, through Joanne Stratakos, refused to offer employment to any of the predecessor's employees because of their union membership or activities or because it intended to hire only enough people to insure that it would not be bound to bargain with the Union as a successor. And in this regard, I credit Stratakos' testimony regarding her intentions to offer jobs to all of the predecessor employees who applied (she did) and her denials of the statements attributed to her. That said, I do believe, however, that the Company's plan, which she carried out, was to arrange the takeover and the hiring process in such a way that there would be a good possibility, *and the hope*, that a sufficient number of the predecessor's employees would refuse employment and therefore a majority of the new work force would not consist of the predecessor's employees.

Although, the Company illegally recognized and assisted another Union at this location, I do not think that this action, by itself, proves that it intended to refuse to hire, for illegal rea-

[1] Joyce Coyne was not alleged as a discriminatee.

[2] For the same reasons, I will credit the testimony of Stratakos over Dan McCole insofar as he too, asserted that she told him that if she offered jobs to more than 50 percent of the predecessor employees, the Union would be voted back in.

sons, any of the predecessor's employees. Moreover, in the absence of having hired a majority of its work force from the predecessor's employees (or illegally refusing to hire them), I do not think that the illegal 8(a)(2) conduct is sufficient to negate the Employer's right to establish its own initial terms and conditions of employment for the people hired at the Smith Haven Mall. Cf. *Advanced Stretchforming International, Inc.,* 322 NLRB 529 (1997). The evidence, in my opinion, is insufficient to establish that the Respondent unlawfully refused to hire employees in order to accomplish what I believe was its hope of not becoming a successor. In my opinion, it succeeded because the Union did not convince a sufficient number of its members to accept the jobs that were offered to them on the terms offered by the Respondent. Had they done so, the Respondent would have been a successor and it would have been obligated to bargain.

In light of the above, I reconfirm my original findings of fact and conclusions of law. I also reconfirm my original Order.